

DEVELOPING A TRIAL LEVEL TOOLBOX FOR **SYSTEMIC ISSUES**

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SYSTEMIC ISSUES IN THE CRIMINAL LEGAL SYSTEM

SYSTEMIC ISSUES IN THE CRIMINAL LEGAL SYSTEM



Daron J. Green

His last words? He said,
*"C'mon and give me what I need,
Sweet Mama."* So I did.









OPERATIONS OF THE FUGITIVE-SLAVE LAW.

Slavery - U.S.

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PICTURE COLLECTION



**Slave patrols and Night
Watches, which later became
modern police departments,
were both designed to control
the behaviors of minorities.**

**Race was a component
of probable cause**

Inferior and Sub-human

THE 13TH AMENDMENT

Neither slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to its jurisdiction.

Ratified in 1865

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Black Codes

In late 1865, (the same year as Juneteenth and 2 years after the Emancipation Proclamation) Mississippi and South Carolina enacted the first black codes. Mississippi's law required Black people to have written evidence of employment for the coming year each January; if they left before the end of the contract, they would be forced to forfeit earlier wages and were subject to arrest.

In South Carolina, a law prohibited Black people from holding any occupation other than farmer or servant unless they paid an annual tax of \$10 to \$100. This provision hit free Black people already living in Charleston and former slave artisans especially hard. In both states, Black people were given heavy penalties for vagrancy, including forced plantation labor in some cases.

The defining feature of the Jim Crow era was the
broad vagrancy law, which gave police



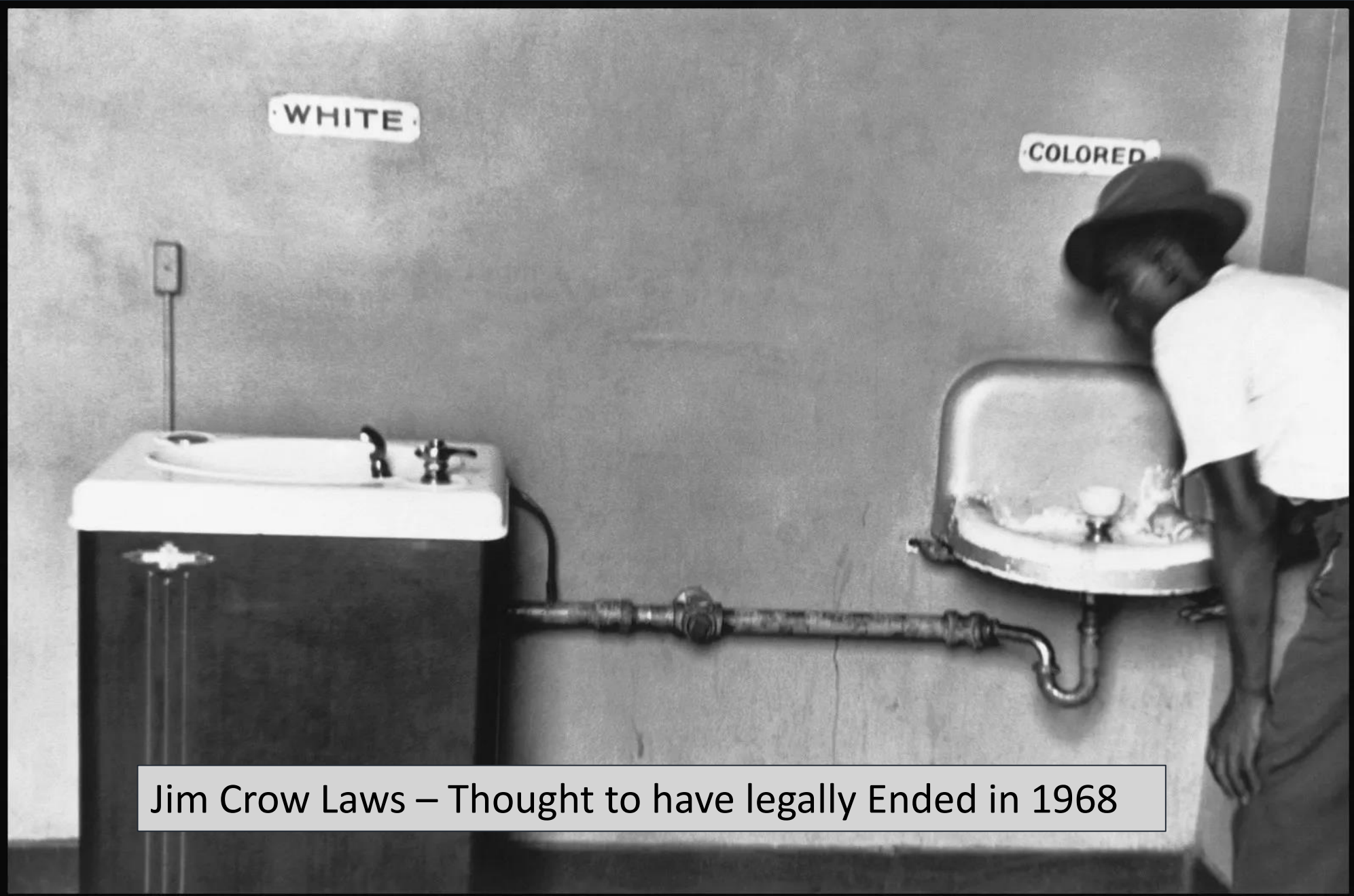
vagrancy law gave police enforcement the
broad authority to stop, question, and arrest
black people. “Probable cause” was race
the convict lease system, also described as “felony hunting”
another name.”



A black and white photograph showing a group of Black men in military uniforms, including hats and jackets, standing in a line in front of a large, steep, rocky hillside. The men are looking towards the camera. The image is used as a background for the text.

BLACK CODES

kept the former slaves legally enslaved



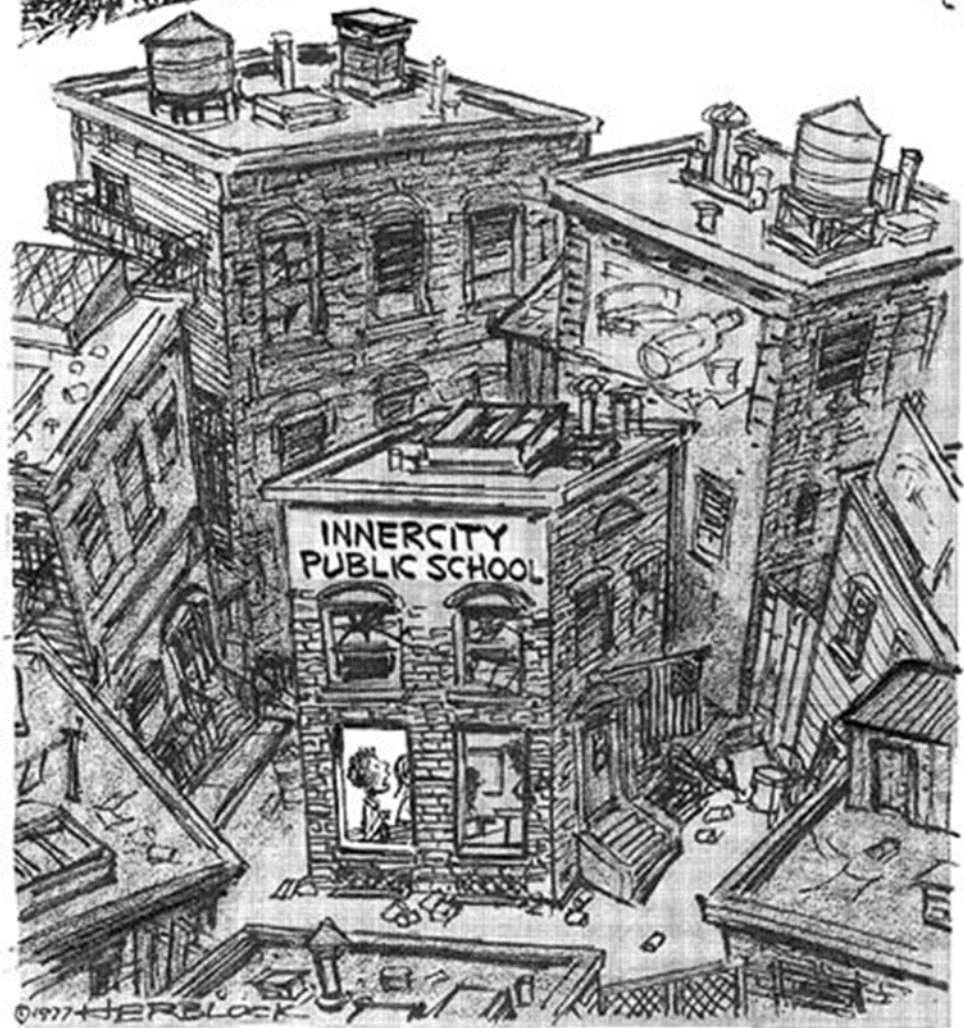
Jim Crow Laws – Thought to have legally Ended in 1968

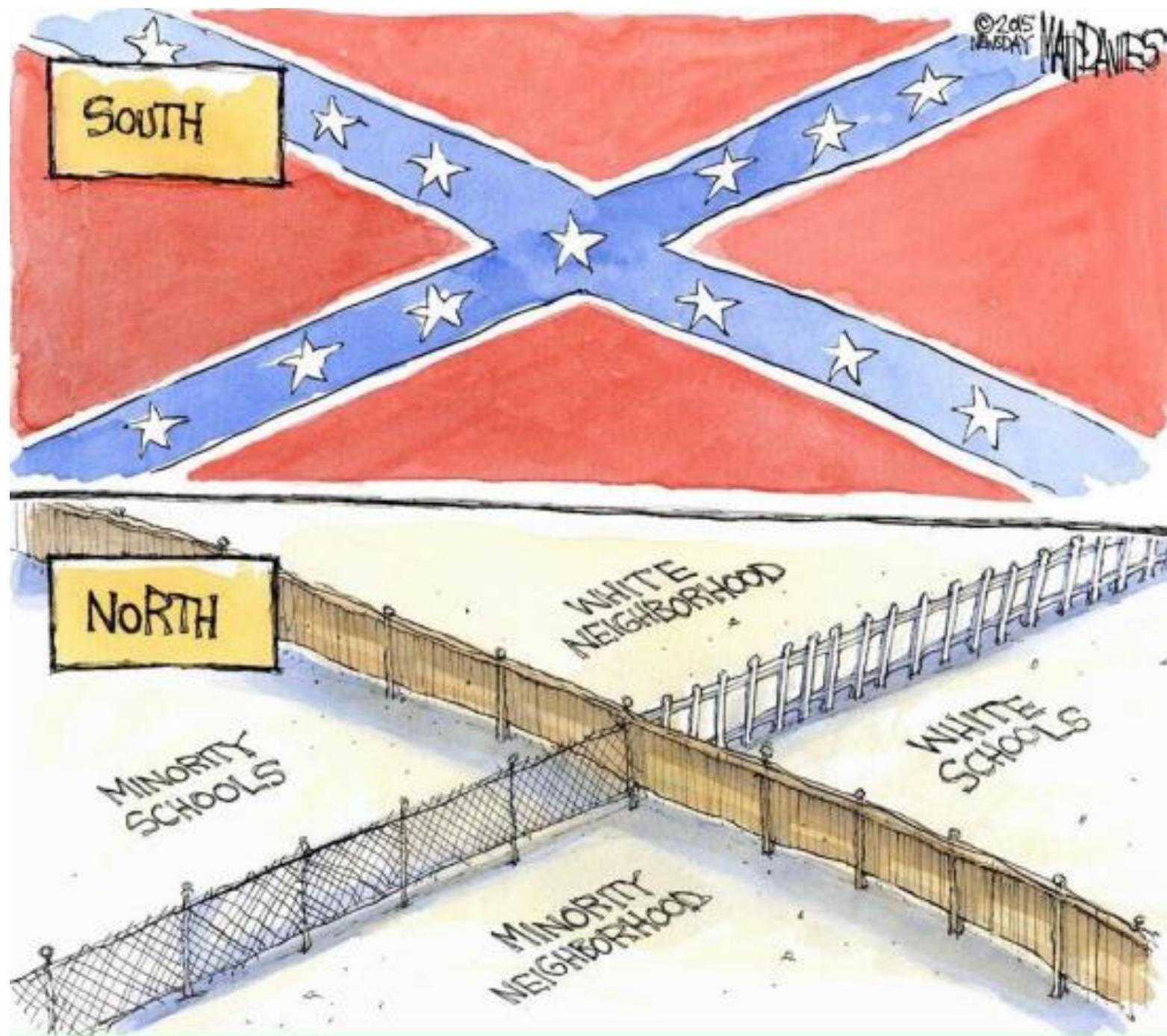




Driving While Black

"...ONE NATION...INDIVISIBLE..."







Selling Water While Black



Napping While Black



Babysitting While Black





OTHERING



Othering is a phenomenon in which some individuals or groups are defined and labeled as not fitting in within the norms of a social group.

It is an effect that influences how people perceive and treat those who are viewed as being part of the in-group versus those who are seen as being part of the out-group.

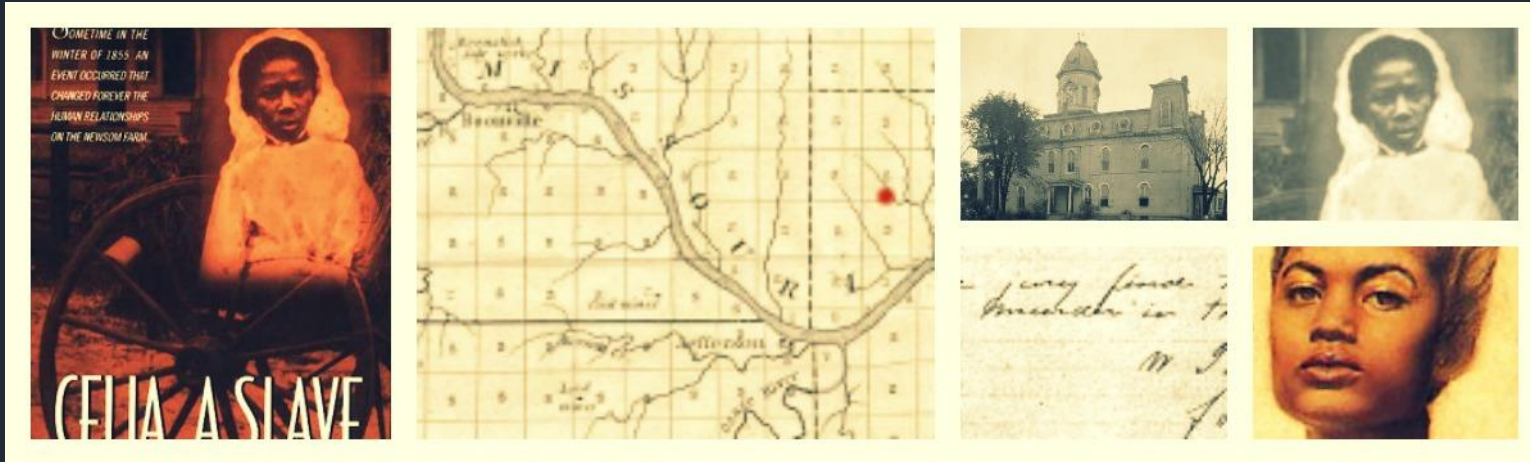
On an individual level, othering plays a role in the formation of prejudices against people and groups. On a larger scale, it can also play a role in the dehumanization of entire groups of people which can then be exploited to drive changes in institutions, governments, and societies. It can lead to the persecution of marginalized groups, the denial of rights based on group identities, or even acts of violence against others.



Race & Juries

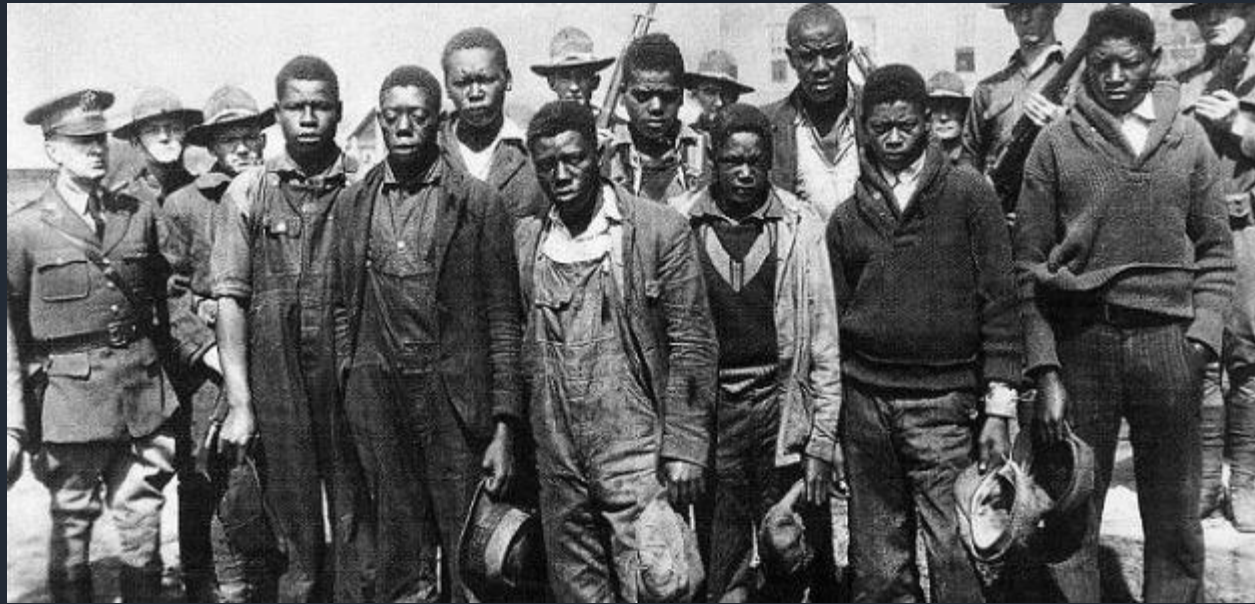


1855 Trial of Celia, A Slave



The the jury find the defendant
guilty of murder in the first
degree
W. J. Selby
Foreman

1930s Trials of The Scottsboro Boys



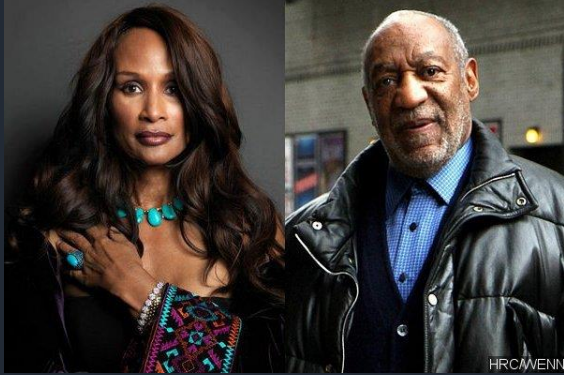
1992 LAPD (Rodney King Beating) Trial

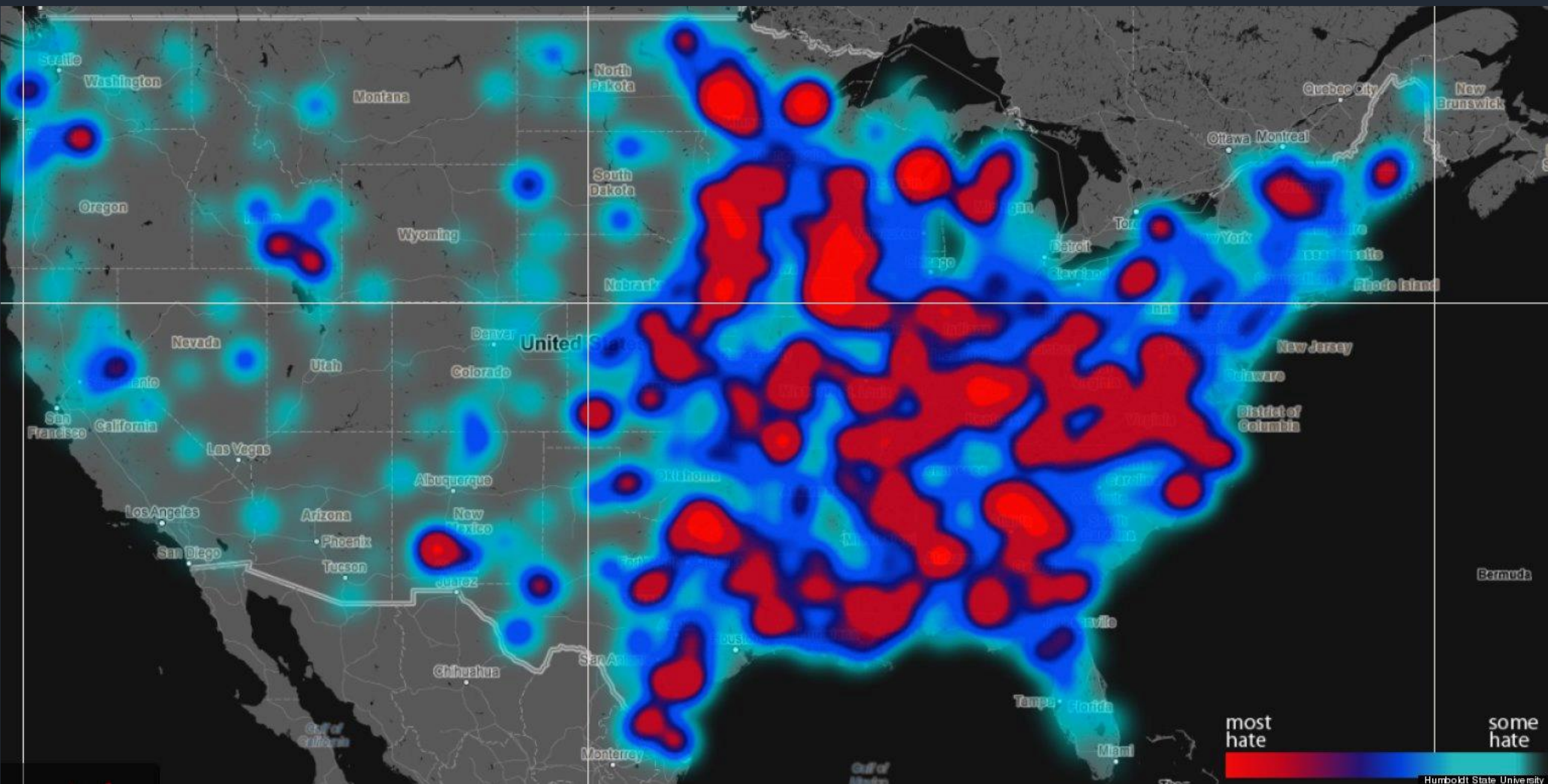


The People v. O.J. Simpson



Bill Cosby Trials 2017 and 2018





Asst. Philadelphia District Attorney



PHILADELPHIA
NEWS

Jack McMahon, 1996



THE PUSH FOR PEACE

STEVENSON ON RACE, POLICE AND HOW TO MOVE FORWARD



Presumption of Guilt





Chattanooga Times Free Press *Bennett*

Presumption of Guilt



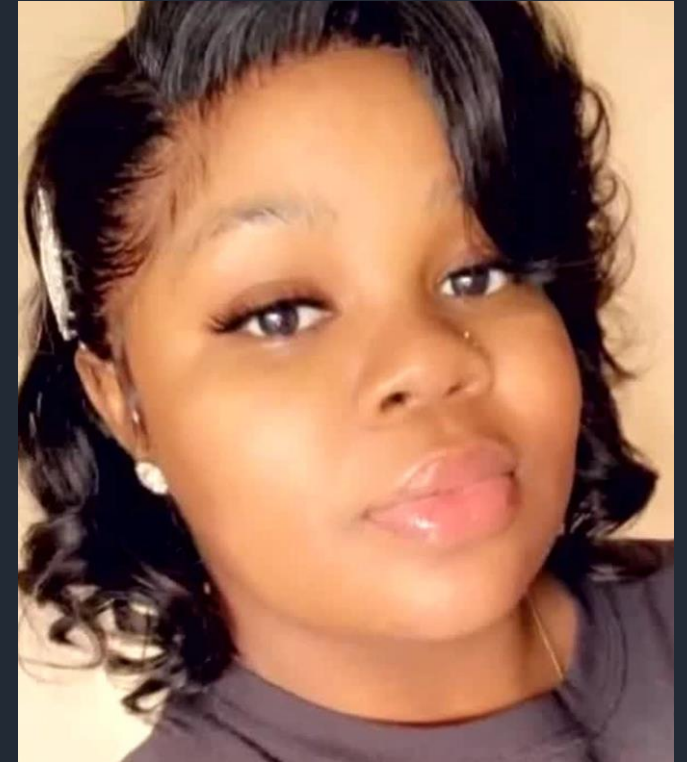




Ahmaud Arbery



Tamir Rice

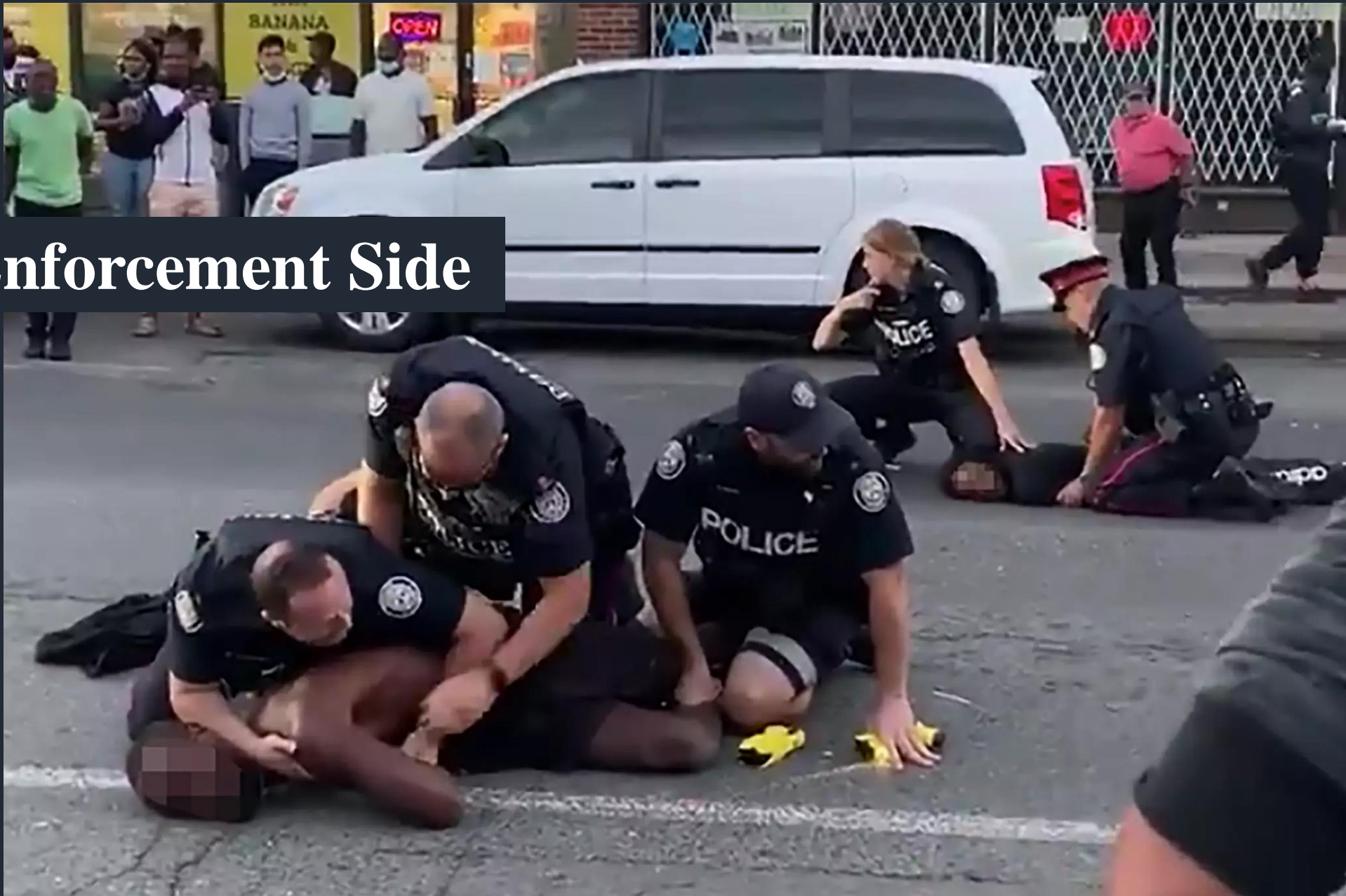


Breonna Taylor

Presumption of Guilt



Law Enforcement Side



The Criminal Court System





Lawyers



Jurors

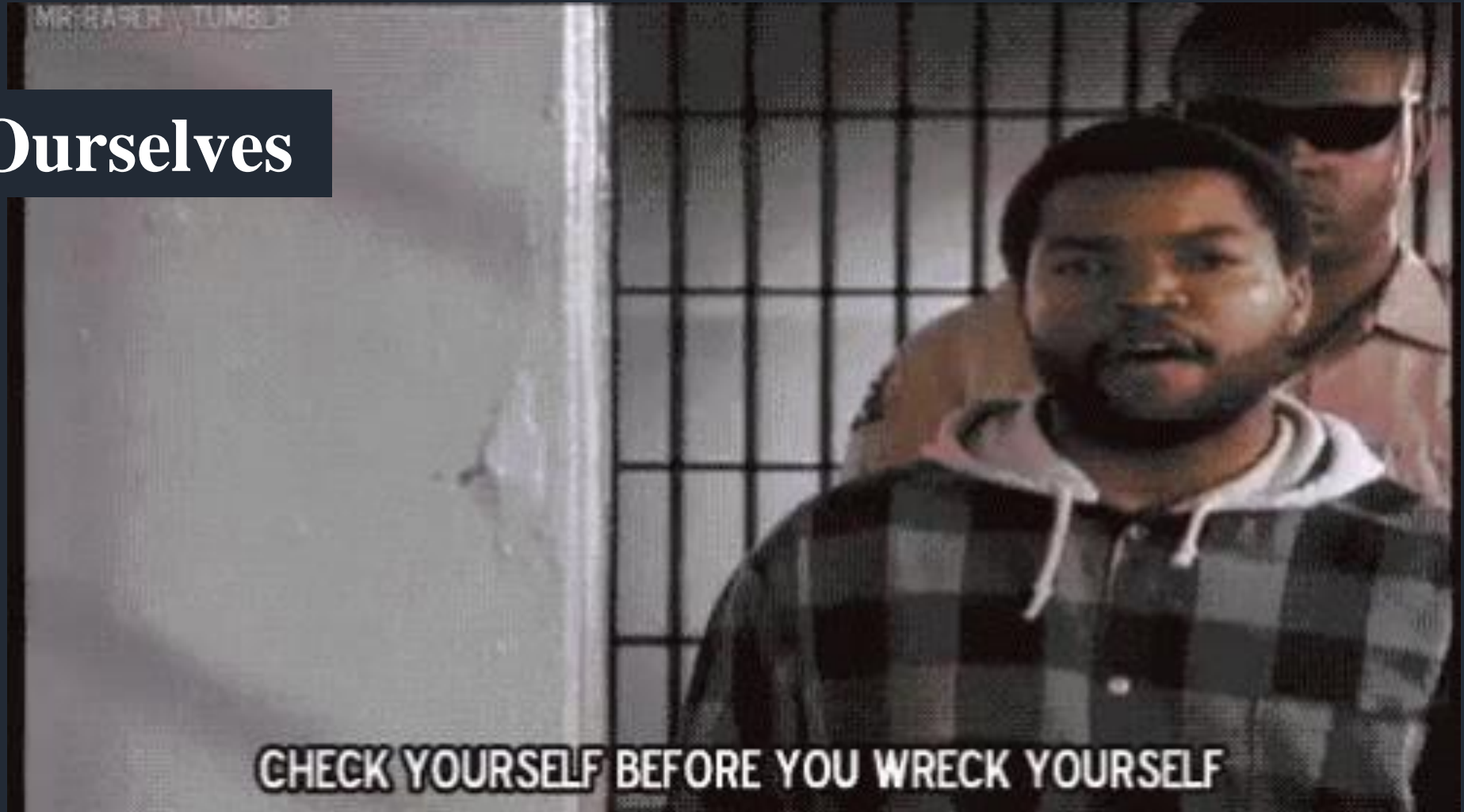


We All Have Implicit Bias



GUARD AGAINST IMPLICIT BIAS

Check Ourselves



“We all have cultural bias, racial bias. One of the difficult things around this subject matter is to deny that we have places we go to subconsciously, and unless you consciously decide that that’s wrong and you’ve got to do something about it, especially if you’re in a position of power, it won’t change.”

DAVID OYELOWO

TAKE AN IMPLICIT BIAS TEST



Batson v. Kentucky



Don't Be Surprised, Prepare for Discrimination in Jury Selection

RACE MATTERS II: THE IMPACT OF RACE ON THE CRIMINAL JUSTICE SYSTEM



**Know the History of the use of Race in Jury
Selection in Your County (and/or by the particular prosecutor)**

**Consider educating the Judge
through filing pretrial motions and motions during trial**

Prepare to preserve the issue for appeal

1. Take good notes during jury selection, keeping track of the demographic variables for each prospective juror and the questions asked of each of them.

MUNICIPAL COURT JURY PANEL CHART						Peremptory Challenges					Only for offenses punishable by more than 90 days in jail		
Date	Case No.	People of State of Calif.	No.	1	2	3	4	5	6	7	8	9	10
		vs.	Plaintiff										
			Defendant										
1	2	3	4	5	6								
7	8	9	10	11	12								

Making a Batson Challenge



2. Be aware of the questions the prosecution asks of members of a protected group. Pay close attention to the answers given.... notate them. Contrast them with the answers to the same questions of others who are not in the protected group.

MUNICIPAL COURT JURY PANEL CHART							Only for offenses punishable by more than 90 days in jail							
				Peremptory Challenges										
				No.	1	2	3	4	5	6	7	8	9	10
Date	Case No.	People of State of Calif.		Plaintiff										
		vs.		Defendant										
1	B/M	2	W/F	3	W/M	4	W/M	5	B/F	6	W/F			
5 th Amen		Rehab		5 th Amen		LE Good		Rehab		LE / Poor				
Rehab		LE Good		LE Good		LE Good		LE Good		Asked about Hardship				
LE / Poor														
7	W/M	8	W/F	9	W/M	10	W/M	11	B/F	12	W/M			
LE / Poor		5 th Amen		LE Good		LE Good		LE Good		Rehab				
								Asked about Hardship		LE Good				

3. Analyze the Prosecution's Strikes

MUNICIPAL COURT JURY PANEL CHART										Only for offenses punishable by more than 90 days in jail			
			Peremptory Challenges										
Date	Case No.	People of State of Calif.	No.	1	2	3	4	5	6	7	8	9	10
		vs.	Plaintiff										
			Defendant										
1	B/M	2	W/F	3	W/M	4	W/M	5	B/F	6	W/F		
5th Amen	Rehab	5 th Amen	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	LE / Poor			
Rehab													
LE / Poor													
7	W/M	8	W/F	9	W/M	10	W/M	11	B/F	12	W/M		
LE / Poor	5 th Amen	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	Rehab			
										LE Good			
										Asked about Hardship			



An Inference of discrimination is created by disparate treatment between Number 5 (BF) and 2 (WM). In that they answered the same. ... only difference is race.

An Inference of discrimination is created by disparate treatment between Number 11 (BF) and 10, 9, 4 (WM). In that they answered the same....only difference is race.

An Inference of discrimination is created by the prosecutor targeting the Black Jurors with questions of hardship.

4. Make Your *Batson* Challenge

a. State on the Record that your Client is a member of a protected group.

b. Point out that members of the defendant's race were removed. **OBJECT** to their removal. Then point out any aspect of Voir Dire that supports an inference of discrimination. Site *Batson* and Due Process.



MUNICIPAL COURT JURY PANEL CHART						Peremptory Challenges					Only for offenses punishable by more than 90 days in jail
Date	Case No.	People of State of Calif.		Plaintiff		No.	1	2	3	4	
		vs.		Defendant							
1	B/M	2	W/F	3	W/M	4	W/M	5	B/F	6	W/F
	5 th Amen Rehab LE / Poor		Rehab LE Good		5 th Amen LE Good		LE Good		Rehab LE Good Asked about Hardship		LE / Poor
7	W/M	8	W/F	9	W/M	10	W/M	11	B/F	12	W/M
	LE / Poor		5 th Amen		LE Good		LE Good		LE Good Asked about Hardship		Rehab LE Good

The State used all of their peremptory strikes to eliminate all of the black people from the panel. Their disproportionate use of strikes.

4. Make Your *Batson* Challenge

MUNICIPAL COURT JURY PANEL CHART

Only for offenses punishable by more than 90 days in jail

Peremptory Challenges

No.

1

2

3

4

5

6

7

8

9

10

Date

Case No.

People of State of Calif.

Plaintiff

Defendant

vs.

1	B/M	2	W/F	3	W/M	4	W/M	5	B/F	6	W/F
5 th Amen	Rehab	5 th Amen	Rehab	5 th Amen	Rehab	5 th Amen	Rehab	5 th Amen	Rehab	5 th Amen	Rehab
LE / Poor	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	LE Good	LE / Poor
7	W/M	8	W/F	9	W/M	10	W/M	11	B/F	12	W/M
LE / Poor	5 th Amen	LE Good	5 th Amen	LE Good	5 th Amen	LE Good	5 th Amen	LE Good	5 th Amen	LE Good	5 th Amen

The State used all of their peremptory strikes to eliminate all of the black people from the panel. Their disproportionate use of strikes.



The State’s questioning singled out Black prospective jurors by only asking them about hardships.

Jurors weren’t asked any questions and were struck.

Prima Facie Case

5. Scrutinize the State's Explanations

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a race neutral explanation for challenging black jurors.

Argue against their reasons.

That explanation is a pretext...disparate treatment between Number 5 (BF) and 2 (WM). In that they answered the same. ... only difference is race.

Still an Inference of discrimination....disparate treatment between Number 11 (BF) and 10, 9, 4 (WM). In that they answered the same....only difference is race.



Batson v. Kentucky



MUNICIPAL COURT JURY PANEL CHART												Only for offenses punishable by more than 90 days in jail															
						Peremptory Challenges																					
Date		Case No.		People of State of Calif.		No.		1		2		3		4		5		6		7		8		9		10	
				vs.		Plaintiff																					
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1		B/M		2		W/F		3		W/M		4		W/M		5		B/F		6		W/F					
5th Amen		Rehab		5th Amen		LE Good		5th Amen		LE Good		LE Good		LE Good		Rehab		LE Good		LE / Poor							
X		Rehab														X		Asked about Hardship									
LE / Poor																											
7		W/M		8		W/F		9		W/M		10		W/M		11		B/F		12		W/M					
LE / Poor		5th Amen		LE Good		LE Good		LE Good		LE Good		LE Good		LE Good		X		LE Good		Rehab		LE Good					
																		X		Asked about Hardship							



Take steps towards preserving the issue for appeal.

Request that a copy of the prosecutors notes
and charts be made part of the record.

Re-Cap

1. Don't be surprised, expect discrimination.
2. Scout the Prosecution.
3. Take detailed notes.
4. Think through making a Batson Challenge before trial.
5. Preserve for appeal.



Justices who voted for Batson



- Courts found that Batson's 6th and 14th Amendment rights had been violated.

- Precedents used to rule in Batson's favor were Strauder v. West Virginia (1880) and Swain V. Alabama (1965).

Justices who voted against Batson



- Prohibits racial discrimination in the selection of jurors.

Litigate Systemic Issues in cases



Voir Dire on Race



Lawyers Don't Talk About Race in Voir Dire





People are who they are.

Lawyers argue against Voir Dire on Race because



Asking a prospective juror whether she would be prejudiced against a defendant because of the defendant's race would be offensive.

No prospective juror would admit to racial bias, even if he was in fact prejudiced against members of a particular racial group.

The Lawyer would be seen as manipulative (playing the race card) and would lose credibility.



Research suggests that calling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make.

Cynthia Lee, A New Approach to Voir Dire on Racial Bias, 5 U.C.Irvine L. Rev.843, 846 (2015); see also Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 881 n.9 (2017) (Alito, J., dissenting).



A study found that regardless of their race, mock jurors who received race-relevant voir dire questions were less likely to vote to convict a Black defendant than the mock jurors who did not receive race-relevant voir dire questions.



Research into implicit bias suggests that making race salient in jury voir dire can reverse the effects of implicit bias and influence the jurors' perceptions of the trial and their decisions.

Samuel R. Sommers & Phoebe C. Ellsworth, How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research, 78 CHI.-KENT L. REV. 997, 1026–27 (2003)



When racial issues arise in a trial, white mock jurors are on guard against the possibility of prejudicial feelings and maintain the appearance of fairness. But when racial issues are not made explicit, white jurors are lenient toward the white defendant and more punitive toward the Black defendant. Most white Americans are taught to believe that racism is unacceptable and may be motivated to deny their prejudiced attitudes against Black people.

Samuel R. Sommers & Phoebe C. Ellsworth, How Much Do We Really Know About Race and Juries?
A Review of Social Science Theory and Research, 78 CHI.-KENT L. REV. 997, 1026–27 (2003)



**What People Have Thought Has
Moved Out Front**

Systemic Changes



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WASHINGTON SUPREME COURT IS FIRST IN NATION TO ADOPT RULE TO REDUCE IMPLICIT RACIAL BIAS IN JURY SELECTION



**NEW RULE ADDRESSES FAILINGS OF U.S.
SUPREME COURT DECISION**

**CONTACT
INFORMATION**

Systemic Changes



Canada Recently Abolished Peremptory Challenges also

On August 30, 2021, the Arizona Supreme Court instituted a landmark rule change that made Arizona the first state in the country to abolish the use of peremptory challenges in criminal and civil trials.

IS JUSTICE COLOR BLIND?

A Duke University-led study on the impact of race on conviction rates raises questions about the criminal justice system.

"Simply put, the luck of the draw on the racial composition of the jury pool has a lot to do with whether someone is convicted...." -- senior author Pat Bayer, chairman of Duke University's Economics Department

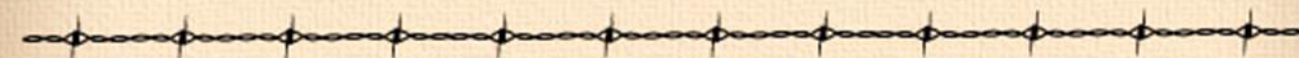
RESEARCHERS
EXAMINED MORE THAN
700 FELONY
TRIALS

IN SARASOTA AND LAKE COUNTIES
IN FLORIDA FROM 2000-2010.

Key findings:

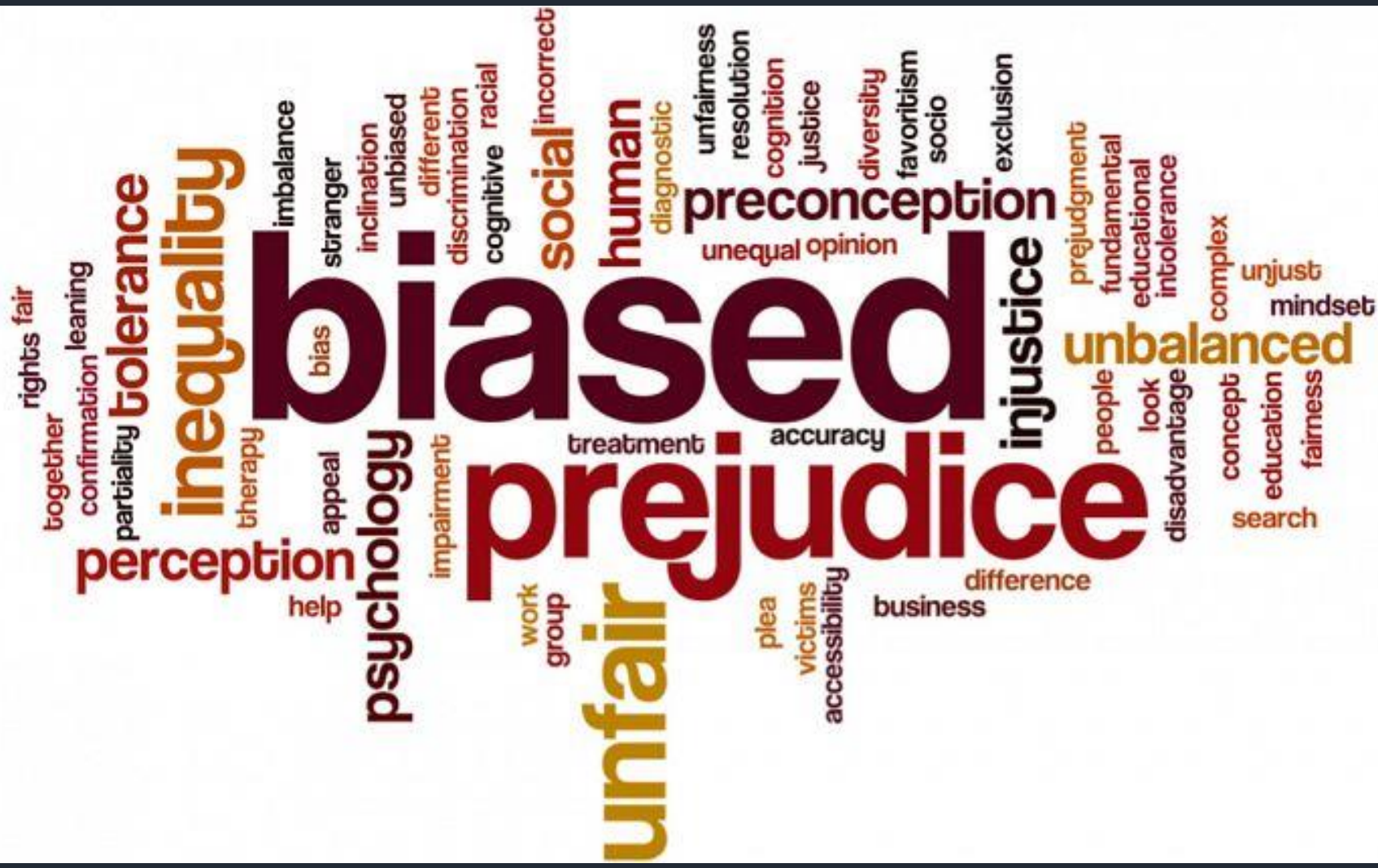


In cases with no black people in the jury pool (typically consisting of around 27 people) blacks were convicted 81 percent of the time, and whites were convicted 66 percent of the time.



When the jury pool included at least one black person, the conviction rates were nearly identical.





**Raise it during
suppression hearings**

Don't run from the issues

**Raise it in good faith during
cross examinations**

**When appropriate raise
as a theory of the
defense**

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